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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TXO PRODUCTION CORP.,
Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, and GROVER C. GOODE,
Respondents.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The Center for Claims Resolution (the "Center") is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[1] The Center was formed in October 1988 to deal with the unprecedented explosion in asbestos-related

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[1] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Certain-Teed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Gypsum Company; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved—through settlement, dismissal, and, in some cases, trial—approximately 115,000 personal injury claims.

As of the date of this brief, approximately 55,000 cases were pending against the Center's members. Virtually all of these suits include claims for punitive damages. In essence, the punitive damages claims made against each Center member seek to punish it for the same conduct, because each such claim is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Absent some change in the law, the Center expects that almost all future actions against its members will likewise seek punitive damages. Awards of such damages in the past have helped drive other defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. The Center's nationwide litigation experience thus gives it a perspective on the punitive damages issue that may prove useful to the Court.[2]

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires "fundamental fairness" in our legal proceedings, *Lassiter* v. *Department of Social Servs.*, 452 U.S. 18, 24 (1981). One of the issues in this case is to what extent the Due Process Clause imposes substantive limits on the amount of punitive damages that may be awarded against

[2] Written consents to the filing of this brief from the parties have been filed with the Clerk of the Court.

a litigant in a particular case for a single wrongful course of conduct.

In framing the standards for such an excessiveness inquiry under the Due Process Clause, the Court should take note of the class of cases arising from mass tort litigation, where a single defendant can be held liable for punitive damages over and over again for precisely the same conduct. While the question of how the excessiveness inquiry should take account of multiple punitive damages awards imposed against a defendant for the same conduct is not presented here, we urge the Court to adopt a standard that does not foreclose consideration of prior punitive damages awards in assessing the excessiveness of a particular award.

In the mass tort setting, the constitutionality of any one punitive damages award cannot be judged by examining it in isolation. Excessiveness must instead be determined by reference to *all* the punishment that a defendant has suffered for the conduct in question. Otherwise, a defendant could be subjected to aggregate punishment for the same course of conduct in amounts that are constitutionally excessive, even though no single award might be so large as to be fundamentally unfair.

ARGUMENT

THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD ALLOW FOR CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES AWARDS IMPOSED ON A DEFENDANT FOR THE SAME CONDUCT

One issue presented in this case is whether the $10 million award of punitive damages against Petitioner TXO Production Corp. is excessive and disproportionate under the Due Process Clause. For the reasons stated in the briefs for Petitioner and supporting *amici*, we believe that the award in this case was excessive and should be set aside.

In considering the standards that should govern whether an award is excessive, however, the Court should bear in mind a situation that is not present in the case at bar, but that has become common and could be affected by the Court's decision in this case. Our concern relates to "the increasingly prevalent mass tort situation . . . [where] a defendant [is exposed] to repetitious punishment for the same culpable conduct." *In re School Asbestos Litig.*, 789 F.2d 996, 1003-04 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). We raise this concern because we expect that it will be urged that an award of punitive damages in a given case is not excessive, so long as that award is reasonably related to the compensatory damages awarded in the case.[3] In that regard, the Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), upheld the award of punitive damages, but did suggest that the greater than 4:1 ratio between the punitive damages and the compensatory damages awarded in that case "may be close to the line" of "constitutional impropriety." *Id.* at 1046 (footnote omitted). In the mass tort setting, an examination of the ratio of punitive damages to compensatory damages in an individual case will not by itself be sufficient to determine excessiveness. This is because the imposition of punitive damages based on a seemingly reasonable relationship to the compensatory damages awarded in any single case could result in punitive judgments that are, in the aggregate of all cases, grossly excessive. Accordingly, we urge the Court to adopt a standard for determining excessiveness that does not foreclose meaningful consideration of prior punitive dam-

[3] Some commentators have suggested that punitive damages awards would be reasonable if they did not exceed a prescribed multiple of compensatory damages. See, *e.g.*, Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1273-74 (1987); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 314-20 (1983).

ages awards imposed for the same conduct in a case where that factor is present.

A. Mass Tort Cases Present Unique Problems

Mass tort litigation is the result of a national market for mass-produced products. Whenever a product distributed to many thousands, or millions, of users is found to have injured some users, the likely result is thousands of products liability suits brought in numerous state and federal forums by other users allegedly also harmed by the product. Typically, each user files a separate claim seeking compensatory and punitive damages against the same defendant. This multiplicity of actions creates a significant potential for multiple awards of punitive damages against a defendant for the same act or course of conduct.[4]

The asbestos products liability litigation is, of course, the leading example of such mass tort litigation. By June 30, 1991, over 71,000 cases had been filed nationwide in the federal courts against various asbestos miners and

[4] See, *e.g.*, *Asbestos Litigation Crisis in Federal and State Courts: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearing*] (statement of Hon. William W. Schwarzer, at 17); Report of the [U.S.] Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 32-33 (Mar. 1991) [hereinafter Judicial Conference Report]; Dennis N. Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 1-2 (1991); Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (Mar. 3, 1989); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 50 (1982).

product manufacturers.[5] Soon thereafter, the Judicial Panel on Multidistrict Litigation transferred the approximately 26,000 then-pending asbestos actions to the Eastern District of Pennsylvania for coordinated or consolidated pre-trial proceedings.[6] A recent report places the number of claims now pending in the multidistrict proceeding at 35,000.[7] State courts are likewise burdened by the onslaught of asbestos litigation—at least 70,000, and perhaps as many as 129,000, asbestos cases are currently pending in various state courts.[8] New claims continue to be filed nationwide against Center members alone at a rate in excess of 1,500 per month.

The gravamen of all of these claims is that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. In the context of the asbestos litigation, the aggregate compensatory damages awards would by themselves satisfy any need for punishment and deterrence. Nevertheless, punitive damages totaling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings. In the asbestos context, multiple punitive damages awards, imposed decades after the allegedly wrongful conduct, punish officers who did not participate in such conduct and shareholders who did not benefit from it. The size of such aggregate punitive awards,[9] when added to the tens of thousands

[5] *Hearing, supra* note 4 (statement of Hon. William W. Schwarzer, at 36).

[6] *In re Asbestos Prods. Liab. Litig. (No. VI) (MDL No. 875)*, 771 F. Supp. 415 (J.P.M.L. 1991).

[7] Asbestos MDL 875 Update (Andrews) (Nov. 9, 1992) at 4.

[8] State Judges Asbestos Litigation Committee, *Megatorts: The Lessons of Asbestos Litigation*, at 1 (July 21, 1992), *reprinted in* Mealey's Litig. Rep. — Asbestos (Nov. 20, 1992) at B-1.

[9] A brief review of published data shows that, even as early as 1982, the punitive damages awards in asbestos cases had become staggering. A survey published in the Asbestos Litigation Reporter (Andrews) that was included in an appendix to the opinion in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), showed that, by the end of 1982, in trials of 147 asbestos cases, a total of $39.47 million in punitive damages had been awarded to 21 plaintiffs. *Id.* at 1338 & n.37. Similarly, at the time it filed for Chapter 11 reorganization in 1982, the Manville Corporation reported that ten punitive damages verdicts had been returned against it, averaging $616,000 each, for a total of $6.16 million. *Id.* at 1339 & n.40. In addition, a study by the Rand Corporation in 1984 reported that, in the period from January 1, 1980 through August 26, 1982, 19 plaintiffs received a total of $4.93 million in punitive damages awards. *Id.* at 1338-39. In more recent years, punitive damages awards have grown even higher. For example, in November 1987, six Delaware plainitffs were awarded $75 million in punitive damages against asbestos defendant Raymark Industries, Inc., which shortly thereafter went into bankruptcy. *George* v. *AC&S, Inc.*, No. 82C-MR71 (Del. Super. Ct., New Castle County, Nov. 9, 1987), *reported in* Asbestos Litig. Rep. (Andrews) (Nov. 20, 1987) at 16,100. Further, in 1990, shortly before filing for bankruptcy protection, the Celotex Corporation stated in affidavits that, between September 1988 and March 1989, over $10 million had been awarded against it for punitive claims, compared to $15 million in judgments for compensatory damages during the same period. *Edwards* v. *Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

[10] Since the commencement of this litigation in the mid-1970s, at least thirteen asbestos manufacturers have filed for protection under the U.S. bankruptcy laws, including Manville, Raymark Industries, Eagle-Picher, H.K. Porter, Celotex, Carey Canada, Forty-Eight Insulations, Unarco, Nicolet, Amatex, Huxley, Pacor, and Standard Asbestos. In addition, National Gypsum Co. is in Chapter 11 reorganization, although its reorganization was not prompted by its asbestos liabilities.

[11] The Judicial Panel on Multidistrict Litigation transferred 78 actions filed against manufacturers of silicone breast implants to

of large compensatory damages awards, have helped to drive many asbestos producers into bankruptcy.[10]

The asbestos products liability litigation is not unique. Mass tort litigation has arisen with respect to numerous products distributed nationwide. Examples include litigation involving silicone gel breast implants;[11] MER/29,

an anti-cholesterol drug;[12] DES, a prescription drug prescribed to prevent miscarriages;[13] bendectin, a prescription drug used to control morning sickness;[14] the Dalkon Shield intrauterine birth control device;[15] computers, adding machines, supermarket checkout scanners, and other devices whose use is alleged to cause "repetitive stress injury";[16] and a particular car transmission alleged

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the Northern District of Alabama this past June. *In re Silicone Gel Breast Implants Prods. Liab. Litig. (MDL No. 926)*, 793 F. Supp. 1098 (J.P.M.L. 1992). Information presented to the Panel at the time of transfer suggested that more than one million women have received silicone breast implants. *Id.* at 1098. Further, among the parties responding to the motions to transfer were attorneys who represented more than 6,000 actual and potential plaintiffs. *Id.* at 1099.

[12] More than 1,500 suits were filed nationwide against the manufacturer, Richardson-Merrell. *Special Project—An Analysis of the Legal, Social and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573, 704 & n.828 (1983).

[13] Approximately 1,000 suits were filed against the manufacturers. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989).

[14] More than 1,900 suits have been filed against the manufacturers. *Id.* at 920-21.

[15] Approximately 14,000 cases have been filed against the manufacturer, A.H. Robins. *Id.* at 921. In 1985, when A.H. Robins declared bankruptcy, the company had settled some 9,200 cases for a total of $530 million, had paid or appealed punitive damages awards totaling over $23 million, and still faced over 5,000 claims for compensatory and punitive damages. *In re A.H. Robins Co.*, 89 B.R. 555, 557-58 (E.D. Va. 1988).

[16] Forty-four "repetitive stress injury" cases filed against manufacturers and employers and pending in the Eastern District of New York were recently consolidated. *In re Repetitive Stress Injury Cases*, 142 F.R.D. 584 (E.D.N.Y. 1992). Affidavits filed with the court at the time of consolidation reported that 16 "repetitive stress injury" cases were pending in the Southern District of New York, 84 cases were pending in New York state courts, and many more cases are expected to be filed in the near future. *Id.* at 585.

to slip out of park into reverse.[17] The multiple claims filed with respect to each product generally allege that it was defective in design or that there was a failure to warn, and it appears that most actions sought punitive damages as well as compensatory damages.

Defendants in such cases can be exposed to overwhelming punitive damages liability. This special problem is exacerbated by the recent emergence of the "multiplier" method of assessing punitive damages. *E.g.*, *Cimino* v. *Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990). Under this approach, punitive damages are tried in "common issue," consolidated trials involving hundreds or possibly thousands of claimants, with the jury determining a punitive damages "multiplier" for each defendant. Then, as compensatory damages are assessed as to each individual claimant, the punitive damages awarded to that claimant are calculated by multiplying the defendant's share of the claimant's compensatory award by the punitive damages "multiplier." Thus, for example, the *Cimino* litigation included a consolidated trial of the defendants' liability for punitive damages to some 2,298 plaintiffs. The jury determined that four defendants were liable for punitive damages and should be assessed those damages at multipliers ranging from 1.5 to 3.0 times the compensatory damages award.[18] 751 F. Supp. at 657-58.

The use of such punitive damages multipliers in consolidated cases, such as *Cimino*, can readily lead to awards of punitive damages totaling hundreds of millions of dollars.[19] And *Cimino* is not the only litigation

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[17] Approximately 700 suits were filed against Ford Motor Co., the manufacturer of the transmission. Seltzer, *supra* note 4, at 38 n.5.

[18] None of the defendants assessed punitive damages in *Cimino* is a Center member.

[19] The dust has not yet settled in *Cimino*. Two of the original four defendants (Celotex and Carey-Canada) have filed for bankruptcy and a third (Fibreboard) has settled. See Asbestos Litig. Rep. (Andrews) (Oct. 16, 1992) at 26,227. Only Pittsburgh-Corning remains, and its liability has not yet been upheld on ap-

where such punitive damages multipliers have been awarded in consolidated trials of hundreds or thousands of claims.[20] Few, if any, companies could survive even single-instance awards of punitive damages totaling hun-

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peal. The jury assigned a punitive damages multiplier of 3.0 to Pittsburgh-Corning. 751 F. Supp. at 657-58. If one assumes hypothetically that this company has a 10% share of compensatory damages (751 F. Supp. at 654), and the average compensatory damages award is $500,000 (which is less than the average awarded by the *Cimino* jury in 160 sample cases, see Order of Nov. 12, 1990, *Cimino* v. *Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex.), *reprinted in* Asbestos Litig. Rep. (Andrews) (Nov. 16, 1990) at 22,039-48), then the average punitive damages award against Pittsburgh-Corning would be $150,000 in each case ($500,000 x 10% x 3). Totaled over 2,298 cases, the multiplier thus might lead to an aggregate award of punitive damages of over $344 million.

[20] Of significance here, such proceedings have been held in the West Virginia state courts. The Kanawha County Circuit Court in 1989 held a consolidated trial in which punitive damages against three defendants were awarded to 315 claimants at a rate three times each claimant's compensatory award. *In re Asbestos Cases*, No. 84-C-3321 *et al.* (W. Va. Cir. Ct., Kanawha County, May 26, 1989), *reported in* Asbestos Litig. Rep. (Andrews) (June 2, 1989) at 19,093. Since then, other West Virginia courts have ordered similar consolidated trials in which the jury would be asked to determine punitive damages multipliers. For example, such a consolidation was ordered of 533 claims in *In re Asbestos Cases (Individuals)*, Civil Action Nos.: All Pending Cases (W. Va. Cir. Ct., Monongahelia County, Sept. 13, 1991). These cases settled, however, after the West Virginia Supreme Court of Appeals denied a petition for writ of prohibition filed on behalf of the Center's members.

In an even bigger litigation, a Maryland Circuit Court consolidated over 8,500 cases from across the state and held a "common" issues trial resulting in the award of punitive damages multipliers ranging from 0.35 to 2.5 against several defendants. Order Entering Final Judgments, *Abate* v. *AC&S, Inc.*, No. 89236704 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992) at 10-11, *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26,650, 26,655. As discussed in note 22 *infra*, the court in this action, however, has deferred entering the judgments for punitive damages.

dreds of millions of dollars. And these mass-consolidated cases represent a small fraction of the asbestos personal injury cases pending nationwide in which a typical asbestos defendant would be participating. The imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can thus lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that, in the aggregate, are unquestionably excessive.[21]

B. This Court Should Adopt An Excessiveness Standard That Allows For Consideration Of Multiple Punitive Awards For The Same Conduct

A seemingly reasonable relationship between the amount of punitive damages awarded in a single case and the amount of compensatory damages awarded in that case is thus an inadequate basis for determining lack of excessiveness in the mass tort context. As Judge Friendly noted 26 years ago, in *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967), a products liability lawsuit against the maker of the drug MER/29, "[t]he legal difficulties engendered by [hundreds of] claims for punitive damages . . . are staggering . . . [since] [i]f all [claimants] recovered punitive damages in the amount here awarded these would run into tens of millions."

Uncontrolled multiple awards of punitive damages against a single defendant for the same course of conduct offend the requirement of fundamental fairness imposed

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[21] By itself, the multiplier approach raises substantial due process concerns, because, when a multiplier is used, the jury determining the multiplier has no way of ascertaining the size of the ultimate punitive damages award, the impact that award will have on the defendant, or the circumstances of the individual plaintiff. Thus, the multiplier method does not allow for the "rational decisionmaking" and "meaningful individualized assessment of appropriate deterrence and retribution," *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1044, necessary to satisfy due process.

by the Due Process Clause. *E.g.*, *Lassiter* v. *Department of Social Servs.*, 452 U.S. at 24. Punitive damages are not designed to compensate plaintiffs, but instead are imposed to punish the defendant and to deter it and others from similar conduct in the future. *E.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1045-46; *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). As this Court has recognized, the receipt of punitive damages is therefore a "windfall" to any plaintiff. *E.g.*, *id.* at 267; *IBEW* v. *Foust*, 442 U.S. 42, 50 (1979). In the mass tort setting, punitive damages are also a windfall to the first few plaintiffs who recover them, in contrast with later plaintiffs who might face a bankrupt defendant.[22]

In the mass tort setting, however, there is no mechanism to control the aggregate level of such "windfall" awards of punitive damages in multiple actions. Each

[22] The Director of the Federal Judicial Center, Judge William W. Schwarzer, recently observed that:

> "Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries." *Hearing, supra* note 4 (statement of Hon. William W. Schwarzer, at 13).

Similarly, the Judicial Conference Report, *supra* note 4, at 32, stated: "[M]ultiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants." "The danger of asset depletion" led Judge Marshall A. Levin of the Maryland Circuit Court for Baltimore City to defer payment of any punitive damages award until all approximately 8,500 plaintiffs in the Baltimore City asbestos litigation received their compensatory awards. *Abate* v. *AC&S, Inc.*, *supra* note 20. In the Center's view, the potential threat of asset depletion in that litigation was the result of Judge Levin's unwise and unlawful decision to hold a mass trial of 8,500 claims in which punitive damages multipliers were awarded.

jury awards punitive damages for wrongful conduct that affected an entire class of injured parties without knowledge of prior punitive awards imposed to punish the same conduct.[23] The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of them. Considered together, punitive awards in a series of separate actions involving the same conduct result "in windfall awards to individual plaintiffs at the expense of a disproportionately punished defendant."[24] Thus, evaluating each award in isolation will not protect defendants against the unfairness of multiple punitive damages awards.

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.[25] These

[23] It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. See *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, *modified*, 718 F. Supp. 1233 (D.N.J. 1989). See also Jones *et al.*, *supra* note 4, at 29-30 ("if presented to a jury, evidence of prior awards imposed for the same conduct could do the defendant more harm than good").

[24] *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 889 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

[25] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d 1022, 1032-33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990); *Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *In re School Asbestos Litig.*, 789 F.2d at 1004-05; *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. at 1060-64; *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond*

courts have had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d at 839. As a result, no single test to determine excessiveness and no single remedy for any such excessiveness has emerged from the lower court decisions.

There are a number of possible solutions to avoid "overkill" in mass tort cases, however. One possibility would be a "one-bite" rule; that is, the first punitive award imposed against a defendant for a course of conduct would preclude all future claims for punitive damages for the same conduct.[26] Another possibility would require

Shamrock Chems. Co., 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. at 899. See also *United States Mineral Prods. Co.* v. *Waters*, Nos. 90-1838, 90-2010, 91-282, 1992 WL 353387 (Fla. Dist. Ct. App. Nov. 24, 1992), where a panel of the Florida District Court of Appeals *sua sponte* certified to the Florida Supreme Court the issue of whether multiple punitive damages awards for a single course of conduct are permissible.

[26] See, *e.g.*, *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, which allowed a defendant to strike a punitive damages claim upon proof that punitive damages had previously been imposed for the same conduct on the ground that due process barred the imposition of more than one punitive damages award for the same course of conduct. On reconsideration, the court conditioned its ruling upon a showing that the prior punitive damages award had been made after a complete hearing with an opportunity for similarly situated plaintiffs to participate, and with an instruction to the jury that its award would be the only punitive award for such conduct. 718 F. Supp. at 1235. See also *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728 ("In theory, . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.")

By statute, Georgia has attempted to impose in part the one-bite solution. Ga. Code Ann. § 51-12-5.1(e)(1) (Michie Supp. 1992) prohibits multiple recoveries of punitive damages against one defendant in products liability actions in that state. The court in *McBride* v. *General Motors Corp.*, 737 F. Supp. at 1579, however, held that the one-award punitive damages provision violated the Equal Protection and Due Process Clauses of the Georgia and United States Constitutions, because it applied only in products liability cases and not in other tort cases. Of course, even if *McBride* is ultimately overturned, the Georgia statute would still apply only in the courts in that state and would not limit awards elsewhere.

the trial judge to reduce the jury's punitive damages award against a defendant in a particular case by a dollar-for-dollar credit for punitive damages previously awarded against that defendant for the same course of conduct.[27] Other solutions might be possible.[28]

[27] This approach has been codified in Missouri. Missouri provides for a post-trial proceeding in which the defendant may request "the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based." Mo. Rev. Stat. § 510.263(4) (1991). The statute permits the court to offset all prior punitive awards against a defendant for the same conduct regardless of the jurisdiction in which they were imposed.

[28] Judge Schwarzer has stated that an ideal national solution to asbestos litigation problems would "reserve punitive damages until the claims of present and future claimants for compensatory damages have been satisfied." *Hearing*, *supra* note 4 (statement of Hon. William W. Schwarzer, at 7). Consistent with this view, Judge Charles R. Weiner, the multidistrict judge in *In re Asbestos Prods. Liab. Litig.*, *supra* note 6, in ordering the transfer of cases back to their transferor courts, has routinely severed the punitive damages claims in those cases and retained jurisdiction over them. Those orders provide that "the issue of punitive damages must be resolved at a further date . . . ." *E.g.*, Order of May 1, 1992, MDL No. 875 (E.D. Pa.). Actions such as this will aid the courts and the parties in finding solutions to the punitive damages problem and should be encouraged.

Other suggestions are not, however, likely to solve the problem. For instance, it has been proposed that the trial judge, in reviewing the excessiveness of a particular punitive damages award, should consider evidence of prior punitive awards against the defendant for the same conduct, and to reduce or set aside the present award to the extent that it imposes excessive punishment for the same conduct. See *Juzwin* v. *Amtorg Trading Corp.*, 705

The Court need not resolve this question now. We urge the Court, however, to adopt a standard for determining excessiveness in this case that leaves room for consideration of prior punitive damages imposed on a defendant for the same conduct and does not foreclose consideration of whether multiple awards of punitive damages violate due process, so that the lower courts can continue to grapple with this question and this Court can consider it in an appropriate case.[29]

F. Supp. at 1056 n.1. The Alabama post-award review procedure approved by this Court in *Haslip* included consideration of such other awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. at 1045. If the post-verdict review for excessiveness that occurred in this case is any guide, however, post-trial review is not likely to be effective.

[29] See *Dunn* v. *HOVIC*, No. 91-3837, 1992 WL 228875 (3d Cir. Sept. 18, 1992), *vacated and reh'g in banc granted*, (3d Cir. Oct. 8, 1992), where a panel of the Third Circuit disagreed about whether the multiple imposition of punitive damages was excessive. The Third Circuit will revisit this issue in its *in banc* proceedings. See also, *e.g.*, *Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir.) (insufficient record precludes consideration of due process challenge to multiple awards of punitive damages), *cert. dismissed*, 497 U.S. 1057 (1990); *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1287 (2d Cir.) ("[I]nsufficient proof to demonstrate an unjust result of multiple imposition of punitive damages for the same course of conduct."), *cert. denied*, 111 S. Ct. 297 (1990); *Racich* v. *Celotex Corp.*, 887 F.2d at 398 (substantive due process issue of multiple punitive damages awards not adequately raised nor properly preserved); *Eagle-Picher Indus., Inc.* v. *Balbos*, 604 A.2d 445, 472 (Md. 1992) (no foundation for argument that multiple punitive damages awards violate due process).

CONCLUSION

For the reasons stated in the briefs for Petitioner and supporting *amici*, the judgment of the West Virginia Supreme Court of Appeals should be reversed and the case remanded for further proceedings. For the reasons stated in this brief, any standard for determining whether an individual award of punitive damages is excessive should allow for consideration of prior awards for the same conduct.

Respectfully submitted,

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